

“Please Don’t Stop the Music”: The Need for Fairness in Digital Copyright

ADAM VUKOVIC*

Each month, over 100 million Americans listen to and discover music through Internet radio stations. Section 114 of the Copyright Act requires Internet radio stations, as providers of digital radio transmissions, to pay performance royalties. Due to an outdated royalty determination method, these Internet radio stations regularly spend over half of their revenue to secure royalties for the songs streamed through their websites—far more than paid by digital radio stations. The Internet Radio Fairness Act sought to equalize the royalty rates paid by Internet radio services and their digital counterparts. Unfortunately, due to fierce lobbying, the bill has been abandoned and Internet radio stations continue to face challenges to securing fair and reasonable royalty rates. This Note first seeks to explore the history of U.S. copyright legislation to better understand how we have reached such disparate royalty determination methods. Subsequently, this Note considers the arguments against uniform digital radio royalty schemes and discusses how the abandonment of the Internet Radio Fairness Act was a missed opportunity as passage of the Act would have provided Internet radio stations with the financial flexibility required to make technological advancements that could benefit all relevant parties.

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INTRODUCTION

In November 1994, Mick Jagger and The Rolling Stones performed the first major concert broadcasted over the Internet.¹ Jagger opened this landmark event by stating: “I wanna say a special welcome to everyone that’s, uh, climbed into the Internet tonight and, uh, has got into the M-bone. And I hope it doesn’t all collapse.”² Fortunately, Jagger’s concerns were misplaced; the Internet did not cave in on itself and has since become a significant music broadcasting platform, with Internet-based radio services reaching an estimated 103 million listeners per month.³

While the traditional, terrestrial radio format might reach a larger number of people, the music played is determined by radio stations that

1. Peter H. Lewis, *Peering Out a ‘Real Time’ Window*, N.Y. TIMES, Feb. 8, 1995, at D1.

2. *Id.* The “M-bone,” as it was called, refers to the “multicast backbone, which functions as a network based on the Internet’s framework.” *Id.*

3. ARBITRON INC. & EDISON RESEARCH, THE INFINITE DIAL 2012: NAVIGATING DIGITAL PLATFORMS 8 (2012). These 103 million monthly listeners account for approximately thirty-nine percent of the U.S. population aged twelve or older. *Id.*

tend to favor more popular songs promoted by large record companies; independent and obscure artists are rarely represented.⁴ Internet radio stations like Pandora present⁵ a great opportunity for these aspiring musicians. To begin, fans of a specific music genre choose their favorite artists, then the Internet radio station plays the music, sharing similar elements with the artist initially selected,⁶ and allowing music fans the opportunity to discover new artists they might enjoy. This has potential to create a diverse fan base that can purchase music, merchandise, and concert tickets. Internet radio services allow the listener to eschew the musical preferences of traditional radio programmers and record label executives in favor of music that better aligns with her personal taste.⁷ In essence, Internet radio has connected less prominent musicians, unable to secure national radio airplay, with people who will appreciate their art. Just as important to aspiring musicians is the way in which Internet radio has affected their copyright interests.

The production of every piece of music brings with it two separate copyrightable works: a musical composition and a sound recording.⁸ A musical composition consists of the musical notes and lyrics put together by the composer, while the sound recording is made up of the recording or singing of that music composition as a whole.⁹ Typically, the composer owns the copyright to the musical composition and the record label owns the copyright to the sound recording.¹⁰ When a song is played over the Internet, it involves the performance of both the musical composition and the sound recording, therefore triggering both copyright protections inherent in a piece of music.¹¹ In contrast, when a song is played over traditional AM/FM radio, the only copyright affected is that of the musical composition.¹² This distinction is crucial in determining how different radio broadcasters pay royalties.

4. See, e.g., Clyde Smith, *Indie Artists Share How They Got Radio Airplay, What It Meant for Their Careers*, HYPEBOT (June 5, 2012), <http://www.hypebot.com/hypebot/2012/06/earbits-breaking-into-fm-radio.html> (various independent artists discussing the difficulties of obtaining mainstream radio airplay without the assistance of a large recording label providing marketing and public relations support).

5. See ARBITRON INC. & EDISON RESEARCH, *supra* note 3, at 24.

6. This is the method used by Pandora, one of the most prevalent Internet radio services. See Rob Walker, *The Song Decoders*, N.Y. TIMES MAGAZINE, Oct. 18, 2009, at 48. Pandora employs “musicologists” who pore over the technical (beats per minute, octaves, chords) and the subjective (how happy is this song?) aspects of individual songs. *Id.* The results of this analysis are used to suggest artists and songs that share similar qualities to those artists chosen by the user at the outset. *Id.*

7. See *id.*

8. See Karen Fessler, Note, *Webcasting Royalty Rates*, 18 BERKELEY TECH. L.J. 399, 401 (2003) (“Recorded songs . . . typically consist of two separate copyrightable works: the ‘musical work,’ the series of notes and lyrics that a composer creates, and the ‘sound recording,’ the actual sound of a performance of those notes and lyrics.”).

9. WILLIAM W. FISHER III, PROMISES TO KEEP 39–41 (2004).

10. See Fessler, *supra* note 8, at 401; see also JOANNA DEMERS, STEAL THIS MUSIC 22 (2006).

11. 17 U.S.C. §§ 101, 106(4), 106(6) (2012).

12. See Fessler, *supra* note 8, at 401.

Traditional radio providers are only required to pay publishing royalties to the composer of a particular song played on the air, not the owner of the copyright in the sound recording.¹³ Digital radio providers, on the other hand, must also pay the performance fee for the sound recording in addition to the publishing royalty paid to the composer.¹⁴ Digital radio providers are required to pay these performance fees under section 114 of Copyright Act. The Copyright Royalty Board (“CRB”) determines the amount of these fees, using different techniques to calculate the amount due based on the broadcast method employed.¹⁵ This has resulted in a great disparity between the fees paid by Internet radio providers, like Pandora, and those paid by cable or satellite providers, like Sirius XM.¹⁶

On September 21, 2012, Congressman Jason Chaffetz introduced the Internet Radio Fairness Act (“IRFA”).¹⁷ This bipartisan bill sought to level the playing field between Internet radio providers and their digital counterparts.¹⁸ However, the IRFA stalled and has not been reintroduced.¹⁹ The bill seems all but dead, with Internet radio heavyweight Pandora abandoning the legislation and now considering lobbying the CRB directly.²⁰

This Note explores the history of digital copyright in order to help understand how we have reached this disconnect between rates paid by satellite radio providers and those paid by Internet radio providers. The current approach, in which the CRB determines the royalties owed based on the type of technology used, is misguided. The adoption of a method for determining rates consistent with those proposed by the Internet Fairness Radio Act—using the same standard regardless of whether the digital music is provided through satellite or the Internet—is ideal because it would allow Internet radio to compete fairly with its digital radio counterpart. The music industry is shifting again, this time away from digital music sales and toward digital streaming.²¹ If royalty rates

13. *Id.* Traditional radio broadcasters were able to avoid sound recording royalties because of the presence of their powerful lobbying body, the National Association of Broadcasters. *Id.* at 402 n.15.

14. *See id.* at 401–02.

15. *See* 17 U.S.C. § 114; *see also* discussion *infra* Part II.C.

16. *See, e.g.,* Aidin Vaziri, *Pandora’s Box: The Cost of ‘Free’ Music*, S.F. CHRON., Nov. 30, 2012, at A1. In 2011, Pandora claims to have paid fifty-four percent of revenue to record companies and artists, whereas Sirius is reported to have only paid eight percent. *Id.* It should be noted that Sirius is a subscription-based service, whereas users can listen to Pandora for free.

17. *Boost Innovation with Fair and Equal Internet Radio Royalties*, CONGRESSMAN JASON CHAFFETZ (Nov. 28, 2012), <http://chaffetz.house.gov/chaffetz-boost-innovation-fair-and-equal-internet-radio-royalties>.

18. *Id.*

19. *See* Internet Radio Fairness Act of 2012, H.R. 6480, 112th Cong.

20. *See* Glenn Peoples, *TKO or Split Decision? The Recording Industry Might Have Scored a Big Win as Pandora Stands Down on Legislative Push for Royalty Rate Reform*, BILLBOARD, Nov. 30, 2013, at 5.

21. *See* Ed Christman, *The Digital Decline*, BILLBOARD, Jan. 18, 2014, at 34. Individual digital track sales fell 5.7% in 2013, the first such decline since the introduction of the iTunes store. *Id.*

were consistent across all digital radio formats, webcasters could take advantage of leftover revenue to increase innovation and further connect music lovers with artists they might not yet know.

This Note argues that a more manageable royalty rate would allow webcasters to grow and improve their services, thus attracting more users and in turn increasing royalty fees and exposure for the artists. Part I provides a background of digital copyright law. Part II discusses the current digital copyright standards and royalty schedules as determined by the CRB. Part III disputes the arguments against the Internet radio model, discusses the opportunity missed by abandoning the IRFA, and explains the need for a level playing field between all digital radio providers regardless of their transmission method.

I. HISTORY OF DIGITAL COPYRIGHT: 1909 TO 1998

The 1710 Statute of Anne in England, which served as a model for early U.S. copyright law, was the first statute to provide authors with copyright protection.²² In addition to protecting authors of written works, the purpose of the statute was to “enhance public welfare by encouraging the dissemination of knowledge.”²³ Similarly, the U.S. Constitution empowers Congress “[t]o promote the Progress of Science and useful Arts” by providing authors and inventors copyright protection for their work.²⁴

A. THE COPYRIGHT ACTS OF 1790 AND 1909

Pursuant to the grant of authority in the Copyright Clause,²⁵ Congress passed the Copyright Act of 1790, the first in the United States.²⁶ Similar to the 1710 Statute of Anne in England, the 1790 Act provided protection for works written by American authors for two terms of fourteen years each.²⁷ From the enactment of the 1790 Act until 1909, federal copyright law underwent some general revisions.²⁸ In 1831, for example, musical compositions became copyrightable.²⁹ In 1905,

22. MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 4 (4th ed. 2005). *See, e.g.*, Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

23. LEAFFER, *supra* note 22, at 5. The full title of the 1710 Statute of Anne: “An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.” Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

24. U.S. CONST. art. I, § 8, cl. 8.

25. *Id.*

26. LEAFFER, *supra* note 22, at 6–7.

27. *Id.* at 7. These two fourteen-year terms included the original grant of protection and an optional renewal term. *Id.*

28. *Id.*

29. *Id.* at 7 n.23.

President Theodore Roosevelt called for a complete revision of federal copyright law to better address advances in technology.³⁰

In response to this call for revision, the Librarian of Congress “invited representatives of authors, dramatists, painters, sculptors, architects, composers, photographers, publishers, . . . and printers’ unions to a series of meetings” to overhaul the existing copyright law.³¹ The initial draft afforded music copyright owners “the exclusive right to make or sell any mechanical device that reproduced work in sounds,” effectively giving composers an unfair bargaining advantage over the piano roll and phonograph manufacturers.³² Perhaps this can be explained by the fact that representatives of the latter industries, whose services and instruments were essential to the reproduction and performance of musical compositions, were not included in these meetings.³³

To counteract this legislation, representatives of the piano roll and phonograph industries introduced separate bills that addressed their concerns, but they were unable to reach a vote.³⁴ At this point, the songwriters’ and composers’ representatives suggested that the concerned parties negotiate separately.³⁵ As a result of these separate negotiations, Congress passed the Copyright Act of 1909.³⁶ During these discussions, the interested parties came to agree that the 1909 Act would not include protection for the performance right of musical compositions on mechanical devices.³⁷ Instead, Congress granted artists “a compulsory license for mechanical reproductions of music.”³⁸

Following the adoption of these new laws, composers and artists needed representation to protect their newly established rights. In 1914, the American Society of Composers, Authors, and Publishers (“ASCAP”) formed to protect music creators’ rights and ensure that the creators were fairly compensated for public performances of their work.³⁹

30. *Id.* at 7.

31. JESSICA LITMAN, DIGITAL COPYRIGHT 39 (2001).

32. *Id.* The initial draft that resulted from these meetings would have made the unlicensed manufacturing of piano roll and phonographs illegal. *Id.* In essence, only the copyright owner would have been able to produce the instruments and equipment that could play their music.

33. *Id.*

34. *Id.* at 39–40.

35. *Id.* at 40.

36. *Id.*

37. *Id.*

38. *Id.* A compulsory license allows a party to make and distribute a copy of an artist’s copyrighted work, provided the work has been previously distributed to the public under the copyright holder’s authority. See 17 U.S.C. § 115(a)(1) (2012). In lieu of negotiating directly with the copyright holder, the user may make and distribute copies of the work once she has paid the compulsory license as determined by law or arbitration. *Id.*

39. See Sunny Noh, *Better Late Than Never: The Legal Theoretical Reasons Supporting the Performance Rights Act of 2009*, 6 BUFF. INTELL. PROP. L.J. 83, 89–90 (2009). ASCAP is still active, representing over 450,000 American composers, artists, and music publishers across all genres of

Shortly after formation, ASCAP succeeded in its first appearance before the Supreme Court in *Herbert v. Shanley Co.*⁴⁰ There, the Supreme Court decided that music could not be played as background music in restaurants unless the restaurant owner paid a royalty to the music's copyright holder.⁴¹ More specifically, when a business operating for profit played the musical work of another, that performance constituted a public performance that required compensation.⁴²

Herbert shed light on some of the troubles with the 1909 Act. Even though the Act granted copyright owners a broad range of rights, many uses of copyrighted works still did not require the users to pay the copyright holder.⁴³ For example, artists other than the copyright owner could use musical recordings so long as the performance was not "public."⁴⁴ The term "public" was not defined in the 1909 Act.⁴⁵ Furthermore, these performances could be made "public" so long as they were not for "profit," but Congress declined to define "profit."⁴⁶

By the mid-twentieth century, it became clear that the Copyright Act of 1909 had become outdated and was in need of repair.⁴⁷ The 1909 Act was written to accommodate the media and arts before radio, movies, and television became prevalent.⁴⁸ Recognizing this, Congress authorized the revision of copyright law in 1955.⁴⁹ After more than twenty years of reports and hearings, congressional revisions culminated in the Copyright Act of 1976.⁵⁰

B. THE COPYRIGHT ACT OF 1976

The Copyright Act of 1976 completely overhauled copyright law.⁵¹ It provided copyright holders five distinct rights: "the rights to reproduce

music. See generally, *About ASCAP*, AMERICAN SOC'Y OF COMPOSERS, AUTHORS AND PUBLISHERS, <http://www.ascap.com/about> (last visited June 1, 2014).

40. 242 U.S. 591 (1917).

41. *Id.* at 594-95.

42. *Id.*

43. Robert A. Gorman, *An Overview of the Copyright Act of 1976*, 126 U. PA. L. REV. 856, 863 (1978).

44. *Id.*

45. *Id.*

46. *Id.*

47. LEAFFER, *supra* note 22, at 9.

48. LITMAN, *supra* note 31, at 28. At the time, copyright law was "frozen in the form it had taken in 1912." *Id.* at 49. Radio programs, movies, television shows, and other new forms of media were afforded copyright protection "only to the extent they could be analogized to the statutory list of works subject to copyright, and received rights whose scope was limited by the category in which they best fit." *Id.*

49. LEAFFER, *supra* note 22, at 9.

50. *Id.*

51. See, e.g., *WGN Cont'l. Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 627 (7th Cir. 1982) ("The comprehensive overhaul of copyright law by the Copyright Act of 1976 was impelled by recent technological advances, such as xerography and cable television, which the courts interpreting the prior act . . . had not dealt with to Congress's satisfaction.").

and adapt the copyrighted work, and to distribute, perform, and display it publicly.”⁵² Additionally, it provided for federal preemption in the field of copyright law.⁵³ As Robert A. Gorman noted:

From the moment that the author’s pen imprints words on foolscap, or the composer’s pen makes musical markings on blank notation paper, or the artist puts brush and oil to canvas, the work has become in the constitutional sense a “Writing” and is, pursuant to the 1976 Act, covered by federal copyright—with federal court jurisdiction, federal substantive rules and federal remedies—and state law equivalent to copyright is completely ousted from operation.⁵⁴

The 1976 Act also triggered the creation of the Copyright Royalty Tribunal, an independent agency responsible for setting the compulsory statutory licensing rates for the five enumerated rights.⁵⁵ Tribunal members, appointed by the President, would also adjudicate disputes arising out of those licensing rates.⁵⁶ The CRB has since replaced the Copyright Royalty Tribunal.⁵⁷

Most notably, the 1976 Act granted the public performance right for the underlying composition only, and not for the sound recording.⁵⁸ Therefore, the holders of the sound recording copyright—usually recording companies—did not receive compensation when someone performed the sound recordings in a public venue.⁵⁹ Radio broadcasters resisted awarding a performance right for sound recordings for fear of being charged twice for broadcasting a copyrighted song.⁶⁰ At the time, record companies neglected to push for sound recording royalties, and were simply satisfied that playing the music on traditional radio stations would result in increased record sales, touring revenue, and the sale of promotional materials.⁶¹ The 1976 Act remained mostly untouched until the United States entered the Berne Union in 1988.⁶²

52. See LEAFFER, *supra* note 22, at 10; see also 17 U.S.C. § 106 (1982).

53. LEAFFER, *supra* note 22, at 10.

54. Gorman, *supra* note 43, at 865.

55. 17 U.S.C. § 801.

56. LEAFFER, *supra* note 22, at 294.

57. *Id.* at 294–95. In 1993, Congress replaced the Copyright Royalty Tribunal with the Copyright Arbitration Royalty Panels (“CARPs”). *Id.* at 295. However, Congress abolished the “expensive and inefficient” CARP system in 2004, and it was replaced by three full-time copyright royalty judges who make up the CRB. *Id.*

58. *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 152 (2d Cir. 2009).

59. *Id.*

60. Neil Conley, *The Future of Licensing Music Online: The Role of Collective Rights Organizations and the Effect of Territoriality*, 25 J. MARSHALL J. COMPUTER & INFO. L. 409, 417–18 (2008). Recall that a song contains two distinct copyrights: the composition and the sound recording, which are typically controlled by two different parties. The traditional radio broadcasters used their influential lobbying power to avoid having to pay for both performance rights in one song. See Fessler, *supra* note 8, at 402 n.15 (citations omitted).

61. See *Arista Records*, 578 F.3d at 152. The court in *Arista* noted that “[t]he reason for this lack of copyright protection in sound recordings . . . was that the ‘recording industry and [radio] broadcasters

C. THE BERNE CONVENTION IMPLEMENTATION ACT OF 1988

In March 1988, the United States became a signatory to the Berne Convention, “the largest and most important international copyright convention.”⁶³ To bring our copyright law in line with the Berne Convention, Congress enacted the Berne Convention Implementation Act of 1988 (“BCIA”).⁶⁴ Most significantly, the BCIA modified “formalities such as notice, registration, and recordation as conditions of copyright protection.”⁶⁵

Following the enactment of the BCIA, Congress further amended the 1976 Act by granting rights to visual artists,⁶⁶ protecting architectural works,⁶⁷ and banning direct and indirect rental of computer software.⁶⁸ In 1995, the Digital Performance Right in Sound Recordings Act (“DPRSA”) created a sixth right under section 106: the right to publicly perform a sound recording by digital transmission.⁶⁹ In doing so, sound recording copyright owners received protection from unauthorized digital performances of their work.⁷⁰ Just three years later, advancements in digital media transmission required the Copyright Act to undergo further changes.

D. THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

In 1997, the music industry was up in arms over rampant copyright infringement by peer-to-peer networks, such as Napster and Grokster.⁷¹ These file-sharing networks allegedly cost the music industry one million dollars per day.⁷² During its attempt to combat piracy, the music industry also turned its attention toward webcasting, or non-subscription based Internet radio.⁷³ The music industry feared that “[i]f an internet user

existed in a sort of symbiotic relationship wherein the recording industry recognized that radio airplay was free advertising that lured consumers to retail stores where they would purchase recordings.” *Id.*

62. LEAFFER, *supra* note 22, at 11.

63. *Id.*

64. *Id.*

65. *Id.*

66. See 17 U.S.C. § 106A(d)(2) (2012).

67. See *id.* § 102(a)(8).

68. See *id.* § 109(b).

69. LEAFFER, *supra* note 22, at 13. A digital transmission is “a transmission in whole or in part in a digital or other non-analog format.” 17 U.S.C. § 101.

70. LEAFFER, *supra* note 22, at 13–14. Leaffer refers to this protection of sound recordings as a “step toward bringing the protection of sound recordings under copyright into rough parity with that afforded to other kinds of works.” *Id.* at 13.

71. See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 901–02 (N.D. Cal. 2000), *aff’d in part and rev’d in part* by 239 F.3d 1004 (9th Cir. 2001). Napster and Grokster are file-sharing programs that allow members to exchange music files through a “peer-to-peer” network. Much to the chagrin of the music industry, all files were traded over the network for free.

72. *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 155 (2d Cir. 2009).

73. *Id.* at 150. A webcaster is considered an eligible non-subscription transmission “if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and

could listen to music broadcast over, or downloaded from, the internet for free . . . the user would stop purchasing music.”⁷⁴ In response to these growing concerns, the music industry began lobbying for a congressional amendment to the DPRA.⁷⁵

Music industry lobbyists argued that non-subscription webcasters should also pay the extra licensing fee already imposed on the subscription-based web services covered under the DPRA.⁷⁶ The webcasters responded by forming the Digital Media Association (“DiMA”), a lobbying and trade organization, for the purpose of representing Internet radio’s interests.⁷⁷ Shortly after the formation of DiMA, the Digital Millennium Copyright Act (“DMCA”) became law.⁷⁸

The DMCA primarily addressed the music industry’s piracy and sales concerns by expanding the copyright owners’ performance right in sound recordings to cover recordings broadcast by non-subscription webcasters.⁷⁹ Terrestrial broadcasters retained their exemption from paying royalties on traditional broadcasts, but were later required to also pay the digital broadcasting fee whenever those stations’ broadcasts were simulcast over the Internet.⁸⁰

II. WHERE WE STAND NOW: THE CURRENT DIGITAL COPYRIGHT REGIME

Before discussing why digital copyright law should not take the technology used when delivering digital music into consideration, it is essential to understand how royalty rates are determined across the

the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.” David Nimmer, *Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA ENT. L. REV. 189, 238 (2000) (citing 17 U.S.C. § 114(j)(6)).

74. *Arista Records*, 578 F.3d at 153. Jason Berman, president of the Recording Industry Association of America, expressed concern that without a copyright in a right of performance via Internet technology, the industry would be “unable to compete in this emerging digital era.” *Id.*

75. *Id.* at 153–54.

76. Kimberly L. Craft, *The Webcasting Music Revolution Is Ready to Begin, as Soon as We Figure Out the Copyright Law: The Story of the Music Industry at War with Itself*, 24 HASTINGS COMM. & ENT. L.J. 1, 12–13 (2001). The DPRA, for example, required “webcasters offering subscription music services . . . to pay two licensing fees to both publisher *and* record company for the copyrighted musical work as well as the copyrighted sound recording.” *Id.* at 6.

77. See generally, Jonathan Potter, *Keynote Remarks at the Digital Music Forum*, DIGITAL MEDIA ASS’N (Mar. 1, 2004), <http://www.digmedia.org/component/content/article/41-speeches/113-speeches>. In his keynote address, Jonathan Potter, the founder and then-executive director of DiMA, described the formation of DiMA as being led by “a handful of companies that were passionately focused on developing innovative online opportunities and new commercial markets for creators, recording companies and consumers.” *Id.* At the time of this address, those companies included media heavyweights such as Apple, Yahoo, AOL, and Amazon. *Id.*

78. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.). The DMCA was effective upon enactment on October 28, 1998. *Id.*

79. Nimmer, *supra* note 73, at 238–39.

80. See *Booneville Int’l Corp. v. Peters*, 347 F.3d 485, 495 (3d Cir. 2003) (declaring that an AM/FM webcast does not qualify for exemption from the digital audio transmission performance copyright).

different digital radio platforms. Subpart A discusses the basics of music copyright. Subpart B lists the prevailing performance rights organizations (“PROs”) and describes their place in determining digital copyright royalty rates. Subpart C discusses the compulsory licenses created by the DMCA, as codified in 17 U.S.C. §§ 112 and 114. Subpart D examines the rates paid by satellite radio providers, while Subpart E examines those paid by Internet radio providers.

A. COPYRIGHTABLE MUSIC

As previously discussed, each piece of music entails two separate pieces of copyrightable work: a musical composition and a sound recording.⁸¹ The owners of these two types of copyrights have the exclusive right to do and authorize the following: reproduce their work, make derivative works based upon their composition or sound recordings, and distribute their protected work.⁸² Only the owner of the musical composition has the right to publicly perform her protected work and, as a result, collect royalties when someone else performs this music publicly.⁸³ However, as discussed in Subpart B, the DPRA created a sixth right under 17 U.S.C. § 106, providing the copyright owner of a sound recording with protection from unauthorized performance over a digital transmission.⁸⁴ Therefore, owners of a sound recording copyright are entitled to royalties when their music is played over Internet, satellite, or cable radio.⁸⁵

B. PERFORMANCE RIGHTS ORGANIZATIONS

Under the DMCA, the U.S. Copyright Office is responsible for designating a nonprofit PRO as the copyright holders’ statutory representative.⁸⁶ Instead of negotiating directly with the copyright holder, interested “buyers” interact with the PROs, which then determine the cost of licensing.⁸⁷ PROs are also responsible for receiving royalty payments made by webcasters under the DMCA.⁸⁸ The statutory representative, SoundExchange,⁸⁹ is responsible for setting licensing fees

81. Fessler, *supra* note 8, at 401.

82. *Id.*; see 17 U.S.C. § 106(1)–(3) (2012).

83. 17 U.S.C. § 106(4); see *id.* § 114(a) (“The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).”). See FISHER, *supra* note 9, at 40–41.

84. 17 U.S.C. § 106(6).

85. *See id.*

86. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2899–901 (codified as amended in scattered sections of 17 U.S.C.). A statutory representative collects the rates as required under 17 U.S.C. §§ 112 and 114.

87. *Id.*

88. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

89. *Advocacy*, SOUNDExchange, <http://www.soundexchange.com/advocacy> (last visited June 1, 2014).

and collecting royalties for the use of sound recordings.⁹⁰ If providers negotiating with SoundExchange are not satisfied with the proposed statutory rate, the rates are then reviewed by the CRB.⁹¹

Each public performance of a musical composition also requires a license from the composition's copyright owner.⁹² Three private PROs in the United States are responsible for the facilitation of licenses and the collection and distribution of royalties for the public performance of a musical composition: ASCAP, Broadcast Music Incorporated ("BMI"), and SESAC.⁹³

These PROs "issue 'blanket' performance licenses for all the songs in their catalogues to radio and television stations" in exchange for the payment of a single fee to each organization.⁹⁴ Broadcast radio stations have agreed to pay a flat percentage of their gross revenue—around two percent—to the PROs.⁹⁵ ASCAP, BMI, and SESAC have also established rates for the performance of a musical composition over a digital broadcast.⁹⁶ ASCAP, for example, requires a minimum annual fee of \$288 and \$340 for non-interactive and interactive new media broadcasts, respectively.⁹⁷ After paying this fee, webcasters can opt into one of three rate schedules that best fit their business model.⁹⁸ The rate that an Internet radio webcaster pays for the public performance of a musical composition is significantly lower than what is paid for the public performance of the sound recording.

C. SECTION 114 AND SECTION 112: SOUND RECORDING ROYALTIES

The DMCA, and the DPRA before it, created compulsory licenses for the digital transmission of music.⁹⁹ In order to "perform" a song over the Internet, one must obtain three licenses: (1) a license for the public performance of the musical composition (as paid to the PROs discussed above),¹⁰⁰ (2) a license for the public performance of the sound recording

90. *Id.*

91. 112 Stat. at 2827.

92. See 17 U.S.C. § 106(4).

93. See FISHER, *supra* note 9, at 50.

94. *Id.*

95. *Id.*

96. *Id.*

97. *New Media Rate Calculator*, ASCAP, <https://www.ascap.com/mylicense/newmedia/glsnewmediaratecalc.aspx> (last visited June 1, 2014). A "non-interactive" webcast is one that mimics a traditional radio broadcast in that the listener has no control over the programming. See *Licensing 101*, SOUND EXCHANGE, <http://www.soundexchange.com/service-provider/licensing-101> (last visited June 1, 2014). An interactive webcast is just the opposite: the user compiles his or her own playlist.

98. See, e.g., ASCAP, *supra* note 97.

99. See 17 U.S.C. § 115(a)(1) (2012).

100. *Id.*

to be transmitted by digital means,¹⁰¹ and (3) a license for the creation of ephemeral copies of the sound recording.¹⁰²

Section 114 creates a compulsory license for the digital performance of sound recordings.¹⁰³ It also dictates how the CRB is to determine the cost of these licenses.¹⁰⁴ The CRB uses two different techniques to determine § 114 royalties: (1) the § 801(b)(1) standard for digital cable radio and satellite radio,¹⁰⁵ and (2) the “willing buyer-willing seller” standard for Internet radio.¹⁰⁶ Section 112 creates the compulsory license for the creation of ephemeral copies of songs transmitted via digital means.¹⁰⁷ These licenses are meant to compensate the owner of the sound recording copyright for the one time it is required to “copy” a song in order to transmit it digitally.¹⁰⁸ Section 112 instructs the CRB to determine rates using the “willing buyer-willing seller” standard as well.¹⁰⁹

The Copyright Office designated SoundExchange to be the recipient and distributor of these sound recording royalties.¹¹⁰ SoundExchange purports to represent more than 28,000 record labels and 90,000 recording artists.¹¹¹ Under section 114, sound recording royalties are distributed as follows: fifty percent to the holder of the copyright (usually the record label), forty-five percent to the featured artists, and the remaining five percent for any non-featured artists (back up vocalists and musicians).¹¹² In 2012, SoundExchange reported that it collected and distributed \$462 million in sound recording royalties, an

101. *Id.* § 114.

102. *Id.* § 112. An ephemeral copy refers to the temporary copy of a sound recording that is made in the digital transmission process; as data is transmitted from server to server, the copies reside in the memory of a server for a very short period of time. *See* SOUNDExchange, *supra* note 97.

103. 17 U.S.C. § 114.

104. The CRB replaced the Copyright Royalty Tribunal that existed under the Copyright Act of 1976. *See* Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (codified as amended in scattered sections of 17 U.S.C.).

105. 17 U.S.C. § 801(b)(1).

106. *See id.* § 114(f)(2)(B) (“[T]he [CRB] shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.”). This “willing buyer-willing seller” standard has created a great disparity in the rates paid by satellite radio providers and Internet radio providers and is the focus of Part II.E. *See, e.g.,* Vaziri, *supra* note 16. In 2011, Pandora paid royalties to the tune of fifty-four percent of revenue, whereas Sirius XM paid approximately eight percent of revenue towards royalties. *Id.*

107. *See* 17 U.S.C. § 112.

108. *Id.* § 112(a).

109. *Id.* § 112(e)(4). Section 112 rates are so minimal that they are considered absorbed by the rates due under section 114.

110. *Notice of Designation as Collective Under Statutory License*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/carp/notice-designation-collective.pdf> (last visited June 1, 2014).

111. *See* SOUNDExchange, 2012 ANNUAL REVIEW 2 (2012), *available at* <http://www.soundexchange.com/wp-content/uploads/2014/01/2012-Annual-Review.pdf>.

112. 17 U.S.C. § 114(g)(2).

all-time record.¹¹³ As providers of digital audio transmissions, satellite radio and Internet radio companies paid into this record pot of \$462 million.¹¹⁴ However, because of the different standards used to determine royalty rates based upon the digital service, their contributions can turn out quite differently.¹¹⁵

D. SATELLITE RADIO RATES AND THE § 801(b)(1) STANDARD

Satellite radio has far greater broadcast capabilities than traditional AM/FM radio.¹¹⁶ SiriusXM is the most recognizable name in the satellite radio industry.¹¹⁷ In 2012, SiriusXM announced that it had nearly twenty-four million subscribers, a 9.5% year-over-year gain.¹¹⁸ SiriusXM credits this expansive listener base to its strong relationships with original equipment manufacturers (“OEMs”).¹¹⁹ For example, SiriusXM satellite radio components are available pre-installed in an estimated seventy percent of new cars sold in the United States.¹²⁰ In January 2012, SiriusXM raised its subscription fee almost twelve percent, to \$14.99.¹²¹ Its total revenue for 2012 was \$3.4 billion, a thirteen-percent increase from 2011.¹²² It is from this revenue that satellite radio providers like SiriusXM must pay sound recording licensing royalties.

Licensing royalties for the performance of sound recordings via satellite radio are determined using the objectives set forth in 17 U.S.C.

113. SoundExchange Ends Record-Setting Year with \$462 Million in Total Distributions, SOUND EXCHANGE (Jan. 16, 2013), available at <http://www.soundexchange.com/pr/soundexchange-ends-record-setting-year-with-462-million-in-total-distributions>. This total represents a fifty-eight percent increase in distributions from the previous year. *Id.*

114. *Id.*

115. See Vaziri, *supra* note 16.

116. *What is SiriusXM*, SIRIUSXM, <http://www.siriusxm.com/whatisirsiriusxm> (last visited June 1, 2014). SiriusXM boasts over three million square miles of satellite radio coverage. *Id.* In contrast, traditional AM/FM radio stations are only accessible within a range of 50 to 100 miles. *Id.*

117. SiriusXM is the result of a merger between two formerly competing satellite radio providers: Sirius Satellite Radio and XM Satellite Radio. See Olag Kharif, *The FCC Approves the XM-Sirius Merger*, BUSINESS WEEK (July 25, 2008), <http://www.businessweek.com/stories/2008-07-25/the-fcc-approves-the-xm-sirius-mergerbusinessweek-business-news-stock-market-and-financial-advice>.

118. Zacks Equity Research, *Sirius XM Gains Huge Subscribers*, YAHOO! FINANCE (Oct. 11, 2012, 1:44 PM), <http://finance.yahoo.com/news/sirius-xm-gains-huge-subscribers-174422700.html>.

119. *Id.* An OEM manufactures products or components for a different company to be sold under the purchasing company’s name or within its own products. See IBM, *DICTIONARY OF IBM AND COMPUTING TECHNOLOGY* 66 (2014). Sirius XM comes standard in a wide array of new vehicles being sold in the U.S. market. See, e.g., *Automotive Partners A-K*, SIRIUSXM, <http://www.siriusxm.com/automakers/vehicle> (last visited June 1, 2014). These OEMs are building satellite capable radios directly into their cars. See *id.*

120. Zacks Equity Research, *supra* note 118.

121. *Id.*

122. Glen Peoples, *Sirius XM Posts Record Revenue, Talks About Upcoming Internet Radio Service*, BILLBOARD (Feb. 5, 2013, 10:29 AM), <http://www.billboard.com/biz/articles/news/digital-and-mobile/1537928/sirius-xm-posts-record-revenue-talks-about-upcoming>.

§ 801(b)(1).¹²³ Section 801(b)(1) directs the Copyright Royalty Board to calculate royalties to achieve four objectives:

- (A) To maximize the availability of creative works to the public;
- (B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;
- (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;
- (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.¹²⁴

Thus, the § 801(b)(1) standard seeks to balance the interests of all parties affected by the copyright process: copyright owners, copyright users, and the public. The § 801(b)(1) standard takes into account the creative impact of copyrightable work, whereas the “willing buyer-willing seller standard” focuses only on the hypothetical marketplace between the copyright owner and copyright user.¹²⁵

As digital radio providers, satellite radio stations like SiriusXM must pay the sound recording royalties set out in 17 U.S.C. §§ 112 and 114.¹²⁶ However, when determining the rates to be paid by satellite radio providers, § 114 instructs the CRB to use the § 801(b)(1) standard.¹²⁷ The CRB determines the royalties to be paid by Satellite Digital Audio Radio Services for a set term of four years.¹²⁸ In 2013, the CRB, using the § 801(b)(1) standard, set the rates as follows: 9% of gross revenue for 2013; 9.5% for 2014; 10% for 2015; 10.5% for 2016; and 11% for 2017.¹²⁹ When compared to the royalty rates paid by Internet radio providers, many of which provide their services free of charge or for a subscription fee, satellite radio providers are receiving a far better deal than their Internet counterparts.

123. 17 U.S.C. § 114(f)(1)(B) (2012).

124. *Id.* § 801(b)(1).

125. *See id.* § 114(f)(2)(B).

126. *See id.* §§ 112, 114.

127. *Id.* § 114(f)(1).

128. *See id.* §§ 114(f)(1)(B), 801(b)(1).

129. Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23,054, 23,071 (Apr. 17, 2013) (to be codified at 37 C.F.R. pt. 382).

E. INTERNET RADIO RATES AND THE “WILLING BUYER-WILLING SELLER” STANDARD

1. *Copyright Royalty Board Rate Decision for 2011 to 2015*

In December of 2010, the CRB announced the webcasting royalty rates to be paid under §§ 112 and 114 for the term beginning January 1, 2011, and ending December 31, 2015.¹³⁰ The rates are as follows: \$0.0019 per performance in 2011; \$0.0021 in 2012; \$0.0021 in 2013; \$0.0023 in 2014; and \$0.0023 in 2015.¹³¹ These rates are assessed in addition to the minimum fee of \$500 per channel or station, with a cap of \$50,000.¹³²

The CRB reached these annual rates using the “willing buyer-willing seller” standard set forth in § 114(f)(2)(B).¹³³ In hearings during the rate determination process, Live365, an Internet radio provider, presented an expert witness, economist Mark Fratrick, who misconstrued the standard.¹³⁴ Fratrick argued that a “willing buyer” is one who would only be willing to buy a license if the price would allow the buyer to earn at least a twenty percent profit margin from the use of that sound recording.¹³⁵ The CRB, however, dismissed this analysis, claiming that such a profit margin from the use of sound recording would likely only be obtained by a terrestrial broadcaster, and was therefore not representative of a “willing buyer” in the webcasting market.¹³⁶

Instead, the CRB outlined in its rate determination how it interpreted the “willing buyer-willing seller” standard as codified in the Copyright Act:

The willing buyer/willing seller standard in the Copyright Act encompasses consideration of economic, competitive and programming information presented by the parties, including (1) the promotional or substitution effects of the use of webcasting services by the public on the sales of phonorecords or other effects of the use of webcasting that may interfere with or enhance the sound recording copyright owner’s other streams of revenue from its sound recordings; and (2) the relative

130. See Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13,026, 13,036 (Mar. 9, 2011) (to be codified at 37 C.F.R. pt. 380).

131. *Id.* A “performance” is defined as a single song streamed to a single listener. Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. at 23,099. Thus, if ten people were to listen to a webcaster broadcasting only one song it would be counted as ten performances.

132. See 76 Fed. Reg. at 13,028. In August of 2007, SoundExchange and DiMA announced an agreement to cap the minimum annual fee at \$50,000. See David Oxenford, *Congress to Return—Will Internet Radio Royalties Be on Its Agenda*, BROADCAST LAW BLOG (Aug. 29, 2007), <http://www.broadcastlawblog.com/2007/08/articles/internet-radio/congress-to-return-will-internet-radio-royalties-be-on-its-agenda>.

133. See generally Digital Performance Right in Sound Recordings and Ephemeral Recordings, *supra* note 130.

134. See *id.* at 13,028–30.

135. *Id.*

136. *Id.*

contributions made by the copyright owner and the webcasting service with respect to creativity, technology, capital investment, cost and risk in bringing the copyrighted work and the service to the public.¹³⁷

Comparing this standard with the § 801(b)(1) standard, it is clear that the “willing buyer-willing seller” standard focuses more on the potential risk of material loss on the part of the copyright holder, whereas § 801(b)(1) instructs the CRB to consider the overall benefit of broadcasting the copyright to the public at large. By interpreting the standard in this way, the CRB loses sight of the potential benefits and economic gains that might arise from webcasting, a service that can be closely tailored to reach fans of a specific artist or subgenre of music.

Fortunately, Congress enacted the Webcaster Settlement Act (“WSA”) in October 2008 to address this gap.¹³⁸ The WSA allowed industry-wide royalty rates to be agreed upon by private parties, rather than through hearings conducted by the CRB.¹³⁹ Within a year, SoundExchange entered into one such agreement with a group of webcasters.¹⁴⁰

2. *Pureplay Webcasters Agreement for 2006 to 2015*

In July of 2009, SoundExchange and “pureplay” webcasters reached a settlement agreement under the WSA.¹⁴¹ A “pureplay” webcaster earns its revenue primarily through its webcasting business.¹⁴² This Note focuses on larger commercial webcasters as defined by the Pureplay Webcasters Agreement.¹⁴³

By opting in to the Agreement, webcasters agree to pay a minimum of \$25,000 per year, which is credited toward the royalties owed during that period.¹⁴⁴ A commercial webcaster must also pay the greater of the following: twenty-five percent of gross revenue or a per performance fee.¹⁴⁵ Per performance rates are as follows: \$0.00102 in 2011; \$0.00110 in 2012; \$0.00120 in 2013; \$0.00130 in 2014; and \$0.00140 in 2015.¹⁴⁶ These

137. *Id.* at 13,036.

138. See Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (2008).

139. *Id.*

140. See David Oxenford, *Pureplay Webcasters and SoundExchange Enter into Deal Under Webcaster Settlement Act to Offer Internet Radio Royalty Rate Alternative for 2006-2015*, BROADCAST LAW BLOG (July 7, 2009), <http://www.broadcastlawblog.com/2009/07/articles/pureplay-webcasters-and-soundexchange-enter-into-deal-under-webcaster-settlement-act-to-offer-internet-radio-royalty-rate-alternative-for-2006-2015>.

141. See Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796 (July 17, 2009) (codified at 17 U.S.C. § 114) [hereinafter Pureplay Webcasters Agreement].

142. See *Pureplay Webcaster*, SOUND EXCHANGE, <http://www.soundexchange.com/service-provider/commercial-webcaster/pureplay-webcaster> (last visited June 1, 2014).

143. A commercial webcaster is defined as having an annual gross revenue exceeding \$1.25 million. See Pureplay Webcasters Agreement, *supra* note 141 at 34,799. A small pureplay webcaster is defined as having annual gross revenue less than \$1.25 million. *Id.* at 34,797.

144. *Id.* at 34,799.

145. *Id.*

146. *Id.*

new royalty rate determinations represent a discount from the previous rates determined by the CRB; any pureplay webcasters who qualified and elected into the agreement may pay these rates.¹⁴⁷

Tim Westergren, founder of Pandora, found some reprieve in the Pureplay Webcasters Agreement, referring to the new rates as “survivable.”¹⁴⁸ However, while pleased with the stability and certainty provided by the Agreement, Westergren lamented the fact that Internet radio still paid far higher royalties than any other radio provider.¹⁴⁹ In 2011, Pandora had 80 million registered users and streamed over 3.9 billion hours of music.¹⁵⁰ From October 2010 through September 2011, Pandora accumulated approximately \$83.9 million in revenue.¹⁵¹ Of this \$83.9 million, Pandora paid \$44.4 million in royalty fees—representing nearly fifty-three percent of Pandora’s total revenue.¹⁵² This supports Westergren’s seemingly annual complaint that Pandora spends over half of its revenue paying royalties.¹⁵³ When compared to the approximately nine percent of revenue paid in royalties by satellite radio providers like SiriusXM,¹⁵⁴ there is clearly a disconnect between the royalty schemes applied to the different digital music providers. It is unfair and short-sighted to expect Internet radio providers to be able to compete on such an uneven playing field.

III. THE NEED FOR FAIRNESS IN DIGITAL RADIO

Given the data presented above, the different standards used to determine royalty fees have a disparate impact on Internet radio broadcasters. Maintaining this unfair approach for rate determination stems partially from the music industry’s misplaced fear that Internet radio serves as a substitute for the purchase of music, digital or otherwise. The recently abandoned IRFA would have brought the rates paid by webcasters in line with those paid by other digital radio providers, and a similar approach should still be pursued.

147. See *SoundExchange and “PurePlay” Webcasters Reach Unprecedented Experimental Rate Agreement*, SOUNDEXCHANGE (July 7, 2009), <http://www.soundexchange.com/pr/soundexchange-and-pureplay-webcasters-reach-unprecedented-experimental-rate-agreement>.

148. Tim Westergren, *Important Updates on Royalties*, PANDORA BLOG (July 7, 2009), http://blog.pandora.com/2009/07/07/important_updat_1.

149. *Id.*

150. Jesse Noyes, *10 Fast Facts About Pandora*, CUSTOMER THINK (Feb. 12, 2011), http://customerthink.com/10_fast_facts_about_pandora.

151. *Id.*

152. *Id.*

153. See Tim Westergren, *Join Us to Stop the Discrimination Against Internet Radio*, PANDORA BLOG (Sept. 21, 2012), <http://blog.pandora.com/2012/09/21/join-us>. These expected royalties are only those required under §§ 112 and 114; Pandora will still have to pay the musical composition copyright to PROs like ASCAP; see also *supra* note 16 and accompanying text.

154. See *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, *supra* note 129.

A. OPPOSITION TO INTERNET RADIO IS MISPLACED

As previously noted, record companies hold the copyrights to most sound recordings.¹⁵⁵ These companies contend that webcasting works to reduce album sales and threatens the music industry.¹⁵⁶ In promoting this theory, the recording industry focuses on two arguments: (1) users can make digital copies of the streaming songs, and (2) Internet radio and other webcasting platforms serve as a substitute for purchasing physical albums or individual songs.¹⁵⁷

The first argument against webcasting can be easily defeated. First, the process of copying a stream, also known as “stream-ripping,” requires advanced technological skill and equipment that is not accessible to the everyday user.¹⁵⁸ Furthermore, these webcasters also have an incentive to prevent “stream-ripping”: if anyone can simply rip the song off of their webcast they will not have repeat customers and revenues will likely drop. It seems unlikely that a vast majority of music seekers would adopt such a complex technique to avoid paying \$0.99 for a song.

The record executives’ fear that webcasting will replace digital downloads or purchases of physical CDs certainly deserves more attention than “stream-ripping.” Just this past year, digital music purchases decreased for the first time since 2001, the year Apple launched the iTunes store.¹⁵⁹ In fact, many record executives admitted that advertising and subscription-based webcasting services were “cannibalizing” music sales.¹⁶⁰ At the same time, Internet users streamed audio and video files over fifty million times during the first half of 2013.¹⁶¹ While record executives might cling to this decline in sales as a sign that webcasting is ruining the music industry, a more objective person might realize a potential changing of the guard in the music industry.¹⁶²

Webcasting presents an untapped resource of potential revenue generation for record labels and recording artists. Unlike the glory days of greasing the radio disc jockey’s palm to get an artist’s music on the air, listeners in 2014 proactively seek new artists to follow.¹⁶³ Given the

155. *See supra* Part II.A.

156. Matt Jackson, *From Broadcast to Webcast: Copyright Law and Streaming Media*, 11 TEX. INTELL. PROP. L.J. 447, 450 (2003).

157. *Id.*

158. *Id.* at 450 n.8.

159. Christman, *supra* note 21.

160. *Id.*

161. Emily Steel, *Streaming Services Take Toll on Digital Music Sales*, FIN. TIMES (Jan. 3, 2014, 5:57 PM), <http://www.ft.com/intl/cms/s/0/fec604fc-7499-11e3-af50-00144feabdco.html>. Fifty million streams represented a twenty-four percent growth over the same period in 2012. *Id.*

162. *See id.* Jim Donio, the President of the Music Business Association, thinks that streaming music is likely to account for substantial revenue growth once the full-year numbers are available. *Id.*

163. *See FISHER, supra* note 9, at 58–59. Fisher describes a type of Wild West era of early radio promotion in which record executives would compensate radio program managers with money, prostitutes, and drugs just to ensure their artist would make it onto the air waves. *Id.*

scarcity of radio frequencies, traditional broadcast radio stations are confined to playing the most “popular” songs that will attract the widest audience and drive up their advertising revenue.¹⁶⁴ Internet radio, on the other hand, enables users to tailor their musical preferences and seek out the artists they prefer, eventually introducing them to similar artists they might enjoy.¹⁶⁵ While music fans may not be paying for digital music like they used to, the fans are still paying for something. Instead of spending ten dollars for a digital album or physical CD, listeners are paying a monthly subscription for access to large music libraries.¹⁶⁶ Spotify, another prominent webcasting provider, has over six million paying subscribers and has paid over one billion dollars in royalties to artists since 2008.¹⁶⁷ Clearly, there is still a great amount of money to be made, and it is simply a matter of record labels adapting to a changing market in order to take advantage of new opportunities.¹⁶⁸

In essence, Internet radio is acting as a sort of marketing channel for artists who cannot get their music onto traditional radio stations.¹⁶⁹ When independent artists promote their music through the Internet, they are more likely to reach their fans.¹⁷⁰ More fans leads to more music

164. See Jackson, *supra* note 156, at 451.

165. See Walker, *supra* note 6. Pandora allows users to give a song a “thumbs up” or a “thumbs down,” from which it can further curate a listener’s personal station. See *Thumbs*, PANDORA, <http://help.pandora.com/customer/portal/articles/84832-thumbs> (last visited June 1, 2014).

166. See Robert Cookson, *Music Chiefs Put Faith in Digital Streaming Power*, FIN. TIMES (Jan. 17, 2014, 5:37 PM), <http://www.ft.com/cms/s/0/490e0242-7dd9-11e3-95dd-00144feabdco.html#slideo>.

167. *Id.* In a response to critics, Spotify revealed that it pays an average of \$0.007 per play in royalties. See *Spotify Reveals Artists Earn \$0.007 per Stream*, BBC NEWS (Dec. 4, 2013, 12:24 PM), <http://www.bbc.co.uk/news/entertainment-arts-25217353>.

168. On January 21, 2014, Beats Electronics launched its own Internet radio service, Beats Music. See Alex Pham, *Beats Music: A Step-by-Step Walk Through*, BILLBOARD (Jan. 11, 2014, 2:26 PM), <http://www.billboard.com/biz/articles/news/digital-and-mobile/5869545/beats-music-a-step-by-step-walk-through>. Beats Music allows users to curate a playlist based upon the genres they prefer and even the social situations they find themselves in. *Id.* Beats Music is also considering giving artists access to fan data so they may directly engage with the people listening to their music. *Id.* Beats Electronics has said it is committed to paying every artist the same royalty, but has so far been silent on just how much those royalties amount to. See Paul Resinkoff, *Beats Music Promises to Pay Everyone the Same Royalty Rate*, DIGITAL MUSIC NEWS (Jan. 12, 2014), <http://www.digitalmusicnews.com/permalink/2014/01/12/beatssamewage>.

169. See Eliot Van Buskirk, *Spotify CEO Daniel Ek Talks Royalties, Social and the Future*, EVOLVER.FM (Feb. 10, 2012, 1:15 PM), <http://evolver.fm/2012/02/10/spotify-ceo-daniel-ek-talks-royalties-social-and-the-future>. In his interview with Evolver.fm, Spotify CEO Daniel Ek describes how users promote music by sharing it with their friends, while also generating royalty revenue for the artist every time a song is played. *Id.*

170. In a recent interview, Dave Macklovitch, also known as Dave 1 of the band Chromeo, extols the marketing potential of the Internet for independent artists. See Kev Geoghegan, *Chromeo ‘Trying to Work All Angles’ with New Album*, BBC NEWS (Feb. 3, 2014, 2:44 PM), <http://www.bbc.co.uk/news/entertainment-arts-25863073>. The first single from Chromeo’s forthcoming album has been streamed over 500,000 times in two weeks on Soundcloud, an Internet music streaming service. *Id.* According to Dave 1, such promotional techniques are “part of being a modern group” and “it would be ridiculous to sit back and build our success on radio.” *Id.*

purchases or other royalty generating projects,¹⁷¹ which leads to a tour, which might inspire other independent musicians to promote their art through the Internet as well.

If webcasters could perform on more equal footing with their satellite radio counterparts, record labels and musicians would have a better chance to realize revenue from sound recording licensing than if the webcasters crumbled under crippling royalty fees. By bringing the royalties paid by Internet radio providers in line with those paid by their satellite radio counterparts, webcasters will be able to compete fairly, providing a strong revenue stream for record companies and other parties with a copyright interest in digital music.

B. INTERNET RADIO FAIRNESS ACT AND A MISSED OPPORTUNITY

In September 2012, Congressman Jason Chaffetz of Utah introduced the IRFA.¹⁷² This bipartisan bill aimed to bring royalty rates paid by webcasters in line with the rates paid by other digital radio providers.¹⁷³ In order to achieve this goal, the IRFA sought to amend current copyright law so that the § 801(b)(1) standard would apply to all digital radio royalty rates, regardless of whether the music derives from a satellite or Internet radio station.¹⁷⁴

Despite support from Internet radio and traditional radio heavyweights—Pandora and Clear Channel respectively—the IRFA has essentially been abandoned.¹⁷⁵ Representative Chaffetz allegedly lost enthusiasm for the bill, and instead Pandora is apparently leaning toward directly lobbying the CRB in preparation for the next round of webcaster royalty rate determinations.¹⁷⁶ Pandora might also consider engaging in licensing deals with the record labels directly, effectively avoiding the CRB and its royalty scheme.¹⁷⁷ Despite its biggest supporter dropping out of the race, the underlying goal of the IRFA to apply the § 801(b)(1)

171. Chromeo credits some of its success to licensing their music for use in video games. *Id.*

172. *Boost Innovation*, *supra* note 17.

173. David Oxenford, *Chaffetz Bill Introduced in House of Representatives to Adopt 801(b) Standard for Internet Radio Royalty Decisions of Copyright Royalty Board—What's It All About?*, BROADCAST LAW BLOG (Oct. 8, 2012), <http://www.broadcastlawblog.com/2012/10/articles/internet-radio/chaffetz-bill-introduced-in-house-of-representatives-to-adopt-801b-standard-for-internet-radio-royalty-decisions-of-copyright-royalty-board-whats-it-all-about>.

174. Internet Radio Fairness Act of 2012, H.R. 6480, 112th Cong.

175. Glenn Peoples, *Internet Radio Fairness Act Slips into Hibernation*, BILLBOARD (Jan. 3, 2013, 3:11 PM), <http://www.billboard.com/biz/articles/news/1510514/internet-radio-fairness-act-slips-into-hibernation>.

176. Glenn Peoples, *Pandora Stops Internet Radio Fairness Act Legislation Efforts, To Focus on CRB*, BILLBOARD (Nov. 25, 2013, 4:59 PM), <http://www.billboard.com/biz/articles/news/digital-and-mobile/5800772/pandora-stops-internet-radio-fairness-act-legislation>. The current webcaster royalty rates expire after 2015. *Id.*

177. *Id.* According to Pandora CEO Tim Westergren, “direct deals are not something [Pandora is] allergic to.” *Id.* This is the same tactic used by Apple in securing licenses for its iTunes Radio. *Id.*

standard to all digital radio platforms should still be realized so that webcasters may compete on a level playing field.

Replacing the “willing buyer-willing seller” standard with the § 801(b)(1) standard was one of the most important aspects of the IRFA. Webcasters, by their nature, are able to broadcast far more “performances” than other digital broadcasters.¹⁷⁸ Applying the “willing buyer-willing seller” standard to Internet radio providers results in a burdensome royalty obligation.¹⁷⁹ Given the ubiquity of webcasting services, it is nearly impossible to imagine a logical “willing buyer-willing seller” market lasting much longer. A more manageable royalty rate would allow webcasters to grow and improve their services, thus attracting more users and in turn increasing royalty fees and exposure for the artists.¹⁸⁰

By using the § 801(b)(1) standard, webcasters will only have to pay a percentage of revenues comparable to their satellite counterparts.¹⁸¹ This increase in available revenue will allow the webcasters’ stations to thrive, thus making available a wide range of music genre stations across the Internet. With such wide exposure, recording artists, musicians and record companies will reach their target audience and music fans will be able to discover and connect with the artists they enjoy.

CONCLUSION

Whether webcasting royalty rates are determined using the § 801(b)(1) standard, or a direct deal is struck between webcasters and rights holders, it is most advantageous to the music industry for webcasters to pay a percentage of revenues more in line with their satellite counterparts. The current royalty rates are unsustainable and will affect webcasters’ ability to operate in the future. Webcasters are not in the business of providing illegal downloads or ruining the recording industry; they simply want to continue providing their customers with music that spans all nations, genres, and demographics. It is important that webcasters are given the opportunity to continue reaching the public, for the discovery of a new band might just provide the creative spark needed to inspire the next generation’s legends to pursue their musical dreams.

178. *See supra* note 131 and accompanying text.

179. *See supra* Part II.E.

180. *See Peoples, Business Matters: Internet Radio Bill Is About Fairness—and Money*, BILLBOARD (Nov. 2, 2012, 8:56 PM), <http://www.billboard.com/biz/articles/news/1083163/business-matters-internet-radio-bill-is-about-fairness-and-money>.

181. *Id.*